BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTOPHER L. RICKARD	)	
Claimant	)	
	)	
VS.	)	
	)	
NATIONAL GYPSUM COMPANY	)	
Respondent	)	Docket Nos. 1,021,390 &
	)	1,021,513
	)	
AND	)	
	)	
ACE AMERICAN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the April 15, 2008 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on July 23, 2008.

APPEARANCES

J. Shawn Elliott, of Wichita, Kansas, appeared for the claimant. Christopher J. McCurdy, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties acknowledged that while the Award listed two different payment rates for temporary total disability (TTD) benefits the correct rate of payment is $364.26 per week. The parties further acknowledged that the claimant's child support lien is not in dispute and need not be addressed. And, the parties entered into a written stipulation, filed March 20, 2008 regarding claimant's average weekly wage which was not mentioned in the Award, but is to be considered part of the record. Finally, claimant announced that while he originally requested temporary partial disability benefits, that request is no longer an issue for purposes of this appeal.

ISSUES

Following a regular hearing involving two claims which were earlier consolidated, the ALJ concluded that the claimant was injured out of and in the course of his employment with the respondent from September 2003 and each and every working day through January 24, 2005[1] and awarded the claimant a 23 percent functional impairment and a 67 percent work disability based upon a 66 percent task loss and a 68 percent wage loss.

Respondent has appealed that Award and alleges a number of errors. First, respondent contends that claimant failed to establish proper statutory notice and timely written claim for the September 2003 claim.[2] Second, respondent argues that claimant failed to establish that he met with personal injury arising out of and in the course of his employment in either the September 2003 claim or the January 24, 2005 claim.[3] Simply put, respondent suggests that claimant has a long history of low back complaints that pre-date his employment with this respondent. And any symptoms he had during his period of employment were attributable to his earlier physical problems rather than any work-related event or activities. Third, respondent maintains that claimant failed to establish his entitlement to a permanent partial general work disability under K.S.A. 44-510e(a) as he has no restrictions as a result of any work-related accident and thus, is capable of earning a comparable wage.

Claimant concedes that he has had previous low back complaints but maintains his work related activities in September 2003 and continuing until his last date worked aggravated his pre-existing condition. Claimant further asserts that he provided timely and proper notice of his series of injuries[4] and resulting aggravation, and is therefore entitled to temporary total disability compensation and a work disability of 70.14 percent, based upon a 69.28 percent wage loss and a 71 percent task loss.

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[1] At various times during the proceedings and in briefs and pleadings both parties have referenced January 24, 25 and sometimes January 29, 2005. It is now clear that Monday, January 24, 2005 is the day that claimant suffered an acute onset of back pain when he stepped into a hole while working for respondent.

[2] This claim is filed as Docket No. 1,021,513 and alleges a date of accident as September 2003 and each workday thereafter.

[3] This second claim is filed as Docket No. 1,021,390 and alleges a series of accidents commencing on January 24, 2005 and continuing until claimant's last date of work, which was January 27, 2005.

[4] At oral argument claimant's counsel indicated that claimant had not filed a timely written claim for a single acute injury in September 2003. Rather, claimant is proceeding with this claim as a series of accidents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

This is the fourth time this matter has presented to the Board, although the earlier appeals involved preliminary matters.[5] The ALJ's Award and the Board's earlier Orders set out the facts involved in these claims in great detail and are adopted as if more specifically set forth herein.

Highly summarized, beginning in August 2003 claimant was employed in respondent's gypsum mine loading trucks with explosives. Before he began this employment claimant had experienced low mid back pain at various times which he treated conservatively and at times, with chiropractic care.

Sometime in September 2003 claimant testified that he was removing and passing boxes of materials to coworkers when he twisted his back. Claimant's supervisor, Jesse Rickman, denies any knowledge of the event or that claimant reported any such accident. A coworker, Shane Carr, testified that he recalls an incident with the claimant while unloading hard powder. He remembered that "[w]e were handing boxes back stacking them like we usually do in the magazine and one of the passes off or whatever, I remember Chris or Mr. Rickard either twisted his back wrong or lifted incorrectly or I mean -- and he made a comment that he had tweaked his back and he had said it both to myself and Jesse."[6]

Claimant testified that he told Mr. Rickman of his injury and that Mr. Rickman was actually present when he injured his back, but because claimant did not believe his injury to be serious, he did not ask to fill out any forms. He continued to work that day and in the days that followed. At this point claimant maintains his pain was at a level "5" out of "10".

Claimant's low back complaints continued and he eventually sought treatment from Dr. Kirk Bliss, his family physician.[7] According to claimant, Dr. Bliss gave him an adjustment and a MRI was done in November 2003. Those medical records do not reflect a work-related accident as the source of claimant's complaints. Claimant indicated he did

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[5] K.S.A. 44-534a; K.S.A. 2006 Supp. 44-551(i)(2)(A).

[6] Carr Depo. at 6.

[7] At least some of Dr. Bliss' records are included in the record as exhibits to earlier preliminary hearing transcripts. Normally, such records do not come into evidence at a Regular Hearing unless there is deposition testimony. But both parties have referred to these records and those of Dr. Gorecki and the Board finds that this is a tacit agreement to consider these records part of the record on appeal.

not tell Dr. Bliss of the source of his recent pain as he did not want to lose his job. But claimant also testified that he believed his back was merely out of alignment and would return to normal over time.

Although he continued to work without restrictions, claimant's low back complaints continued and he was eventually referred to Dr. Gorecki, who recommended a second MRI. This MRI revealed degenerative disk disease in the low back. Dr. Gorecki prescribed physical therapy and injections which provided some limited relief. Claimant continued to work without restrictions until January 2005.

On Friday, January 21, 2005 claimant was again seen by Dr. John P. Gorecki, with the same complaints. Claimant testified he was having back pain and pain radiating into his legs. At this point, Dr. Gorecki had already suggested the possibility of surgery to claimant and he concluded that in order to confirm the necessity of surgery, claimant should have a discogram. A discogram is, by all accounts, an uncomfortable test that attempts to recreate the patient's back pain by injecting fluid into each disc. This diagnostic tool helps the surgeon confirm the degree and level of herniation. Dr. Gorecki ordered this test in anticipation of surgery and had discussed this with claimant at the January 21, 2005 office visit. Claimant admits that Dr. Gorecki had recommended surgery as of the date of this examination.

Then, on Monday, January 24, 2005, claimant was working at his normal duties when he stepped into a hole and started to fall. He caught himself on the side of a truck. His coworker, Troy Campbell, witnessed this event and corroborated claimant's recitation of the event. He also corroborated claimant's assertion that their supervisor, Mark Long, was notified immediately afterward of the accident.[8] According to the claimant, his pain was significant and it felt like a knife was in his low back. Claimant and his coworker Troy Campbell finished their job and quit for the day. At this point claimant testified that his pain was at a "five, six, four," on the pain scale, and that his back hurt that day.[9]

Claimant was able to go to work the next day despite his pain. On January 28, 2005, the claimant called in and talked to Mark Long telling him that he was in pain and needed to see a doctor. Claimant was told he needed to talk with Nick Burns, but he was on vacation so the claimant went on his own and got some pain pills from Dr. Bliss. Claimant returned to work on January 31, 2005, but when he could not produce a doctor's release, he was told he could not return to work until he was released without restrictions.[10] Claimant has not worked for respondent since.

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[8] R.H. Trans. at 12.

[9] *Id.* at 13.

[10] *Id.* at 14.

Claimant testified that Dr. Bliss sent him back to Dr. Gorecki who ordered MRIs and ultimately ended up performing a two level fusion surgery on the his back[11] on December 30, 2005. After surgery the claimant was off for a while and once released, was given permanent restrictions. Claimant stated that he presented his restrictions to respondent and believes he asked for an accommodated job. According to claimant, the only response he received was termination papers which he received in November of 2006.[12]

Since being released, claimant has hauled cattle for friends, mowed fields, cut hay and is trading bulls to earn money. Ultimately he found employment as a ranch hand earning $200 per week.

Claimant was examined by Dr. Paul Stein in October 2005. While asking claimant about his history and symptoms, Dr. Stein noted claimant denied any "significant" previous low back complaints. But based on his review of claimant's past medical records, he concluded that claimant indeed had "significant" preexisting problems going back as far as December 2000. He also noted that claimant had not told Dr. Bliss of any work-related accident, but had mentioned his history as a bull rider as well as his history treating with a chiropractor and/or osteopath.

Dr. Stein's review of the records included the MRI reports generated in connection with claimant's treatment in 2003-2004. The first MRI, taken November 11, 2003, revealed degenerative changes at L4-5 and L5-S1 along with some disc protrusion more on the right side than on the left. He also reviewed the actual study generated by the December 2004 MRI and concluded that there were no significant changes when compared to the November 2003 accident. And he reviewed and compared the actual MRI films from the July 22, 2005 MRI and concluded there had been no significant changes to claimant's low back since the last MRI.

Following his examination, Dr. Stein opined that claimant's condition and his complaints in 2003 were not work-related. Dr. Stein explained that:

> . . . it is my opinion, within a reasonable degree of medical probability, that Mr. Rickard's back symptomatology prior to January 24th, 2005, was more related to other factors than to work injury at National Gypsum.
>
> . . . There is no scientific method for accurately measuring the level of an individual's pain so that I cannot state whether or not the incident of 1/24/05 increased the pain in the lower back. What I can state, within a reasonable degree of medical probability, is that there were symptoms sufficient to consider surgery prior to that date and that there is no evidence of structural alteration in the lower back due to the incident of 1/24/05. The possible need for back surgery preexisted

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[11] *Id.* at 18.

[12] *Id.* at 19-20.

> 1/24/05 and was not significantly altered on 1/24/05. There is no documentation of a permanent aggravation at this time.[13]

He went on to opine that the claimant's other activities which included bull riding contributed to the claimant's back pain and frequent visits to the chiropractor. He also stated that the claimant was in need of surgery before his fall in January 2005, and that this fall alone was not enough alone to require a lumbar fusion, but did aggravate the claimant's already existing problems.[14]

Dr. Stein met with the claimant again on January 25, 2007. This visit was a post surgical one and the claimant conceded his back pain was some better. Dr. Stein found the claimant to be at maximum medical improvement and assigned a 20 percent whole person impairment under DRE category IV on the basis of loss of motion segments from the two-level fusion.[15] When asked, Dr. Stein suggested that claimant possibly had a 5 percent whole person impairment under DRE cateory II for his condition pre- January 24, 2005, explaining that the surgery claimant had in December 2005 increased his impairment to a total of 20 percent.

Dr. Stein also recommended that the claimant "permanently avoid lifting more than 50 pounds with any single lift up to twice per day, 40 pounds occasionally but not continuously, 30 pounds frequently but not continuously" and "avoid continuously repetitive bending and twisting of the lower back."[16] Dr. Stein reviewed the task list created by Stephen Benjamin and opined that the claimant could no longer perform 38 out of 72 tasks for a 53 percent task loss.[17]

At his lawyer's request claimant met with Dr. George Fluter on April 3, 2007. Dr. Fluter noted claimant's primary complaint at that time was lower back pain with numbness in the right lower extremity. Upon examination, Dr. Fluter diagnosed claimant with low back pain and right leg numbness post lumbar spine fusion surgery on December 30, 2005. Dr. Fluter concluded claimant was at maximum medical improvement and assigned a 26 percent whole body impairment based on the 4th edition of the *Guides* as a result of the claimant's work injury.[18] There was no attempt to apportion this rating as between the September 2003 accident or the January 24, 2005 accident.

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[13] Stein Depo., Ex. 2 at 6 (Oct. 28, 2005 IME).

[14] *Id.* at 20-21.

[15] *Id.* Ex. 3 at 3 (Jan. 25, 2007 IME).

[16] *Id.*

[17] *Id.* at 27.

[18] Fluter Depo. at 13-14.

Dr. Fluter also imposed work restrictions within the medium level for the claimant of lifting up to 50 pounds occasionally and 20 pounds frequently, bending, stooping and twisting of the lower back limited to on an occasional basis.[19] Dr. Fluter also reviewed the task list of Jerry Hardin and opined that the claimant could no longer perform 44 of 56 tasks for a 79 percent task loss.[20]

The first issue to address is whether claimant suffered personal injury by accident as alleged. A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[21] A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment" on the date alleged.[22] A successful claimant must also establish that the claim has been asserted in a timely manner, both as required by K.S.A. 44-520 (timely notice) and K.S.A. 44-520a(a) (claim for compensation).

One of the difficulties in this case is that the parties litigated two entirely different claims. Claimant filed two separate claims, alleging two *series* of accidents commencing September 2003 and continuing, followed by a second series of accidents, commencing January 24, 2005 and continuing until claimant's last date of work. Then, in his written brief claimant appears to abandon this first claim and asserts that "[c]laimant is alleging a permanent aggravation of his pre-existing condition as a result of the January 24, 2005 accident."[23] No mention is made of the alleged series of accidents commencing September 2003 or the existence of a series from January 24, 2005 and thereafter. The respondent considered this two separate acute injuries, calling the first accident (September 2003) time barred and the second one (January 24, 2005) as manufactured asserting claimant had already been told he was going to need surgery just days before. Matters were further complicated when the ALJ listed the "date of the alleged accident is September of 2003, and each and every working day through January 24, 2005."[24]

The fact that claimant pled a series of accidents in the first claim recognizes the fact that claimant's Application for Hearing in Docket No. 1,021,513 (the September 2003 accident) was not filed until February 2, 2005, well over a year after September 2003. The written claim statute, K.S.A. 44-520a, provides in part:

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[19] *Id.* at 14.

[20] *Id.* at 17.

[21] K.S.A. 44-501(a) (Furse 2000); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[22] K.S.A. 44-501(a).

[23] Claimant's Submission Letter at 12 (filed Feb. 12, 2008).

[24] ALJ Award (Apr. 15, 2008) at 2.

> (a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

If a single acute accident was the basis for the September 2003 injury, then that claim would be, as a matter of law, untimely based on K.S.A.44-520a. But, if the claim is considered a *series* of accidents, then under the applicable law of the case as of the time period involved, then the claim would have been deemed to have occurred on the last date of the series.[25] And because the Application for Hearing was filed within one year of January 24, 2005, the legal "date of accident", then that claim would be considered timely.

After a thorough examination of the evidence, the Board finds that claimant failed to establish that he sustained a series of accidents after September 2003. Rather, the Board believes claimant sustained a single acute injury. While it is true that claimant continued to work his regular job performing all his normal work duties, the record is devoid of any testimony as to how that job continued to cause him physical harm or increased his symptoms from day to day. The medical records do not consistently reference his work activities as the source of his ongoing complaints. The MRI reports from each of the first two MRI's are nearly identical. And claimant does not describe a continuous deterioration of his condition over the course of a workday or work week. If he is consistent about any complaint or the historical recitation of an event it is his reference to an acute accident in September 2003 when he was lifting at work, and then later on January 24, 2005 when he stepped in a hole.

Claimant's own description of his condition paints a picture of an individual who may or may not have had some preexisting condition before September 2003 (due to his work with cattle) but he then went on to have two specific instances of work-related injuries, one in September 2003 and the next on January 24, 2005, several days after he had been told he needed surgery on his back. He more than likely notified his employer about his resulting complaints after September 2003, but at no time did he request medical treatment from respondent or file any sort of written document asserting a claim within 200 days or even one year.

Under these facts and circumstances, the Board concludes that claimant did, in fact, sustain an accidental injury arising out of and in the course of his employment with

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[25] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). The Legislature has since changed the analysis which governs the decision of when an series of accidental injuries culminates in a legal "date of accident". K.S.A. 2005 Supp. 44-508(d).

respondent in September 2003. The accident was witnessed and corroborated by a co-employee. The Board further finds that claimant failed to establish that he suffered a series of injuries after that September 2003 acute injury. And untimely claims cannot be salvaged by the mere allegation that there was a series of injuries following an acute accident. Thus, the claim that was filed in Docket No. 1,021,513 is found to be a single acute injury and was not asserted in a timely manner as required by K.S.A. 44-520a. It follows then that claimant is not entitled to any Award in Docket No. 1,021,513 as he has failed to establish a compensable claim.

Turning now to Docket No, 1,021,390, this claim was originally alleged to be a series of accidents commencing January 24, 2005 and continuing to claimant's last date employment, November 17, 2006.[26] But in his brief to the Board the claimant alleges that he sustained an aggravation of a preexisting injury on January 24, 2005.[27] At oral argument, claimant seemed content to rest on this latest theory of his case, arguing that in spite of Dr. Gorecki's oral and written recommendation (on January 21, 2005) that claimant have surgery, the January 24, 2005 accident prompted claimant's acute onset of low back complaints and subsequent need for surgery.

After considering all of the evidence, particularly the physicians' testimony, a majority of the Board finds that claimant sustained only a temporary aggravation of his low back complaints as a result of his accident on January 24, 2005. This finding is based upon the minimal changes as between the different MRI's that were performed November 2003, December 2004 and July 2005 and opinion of Dr. Stein. And while claimant certainly had an acute onset of pain following the misstep into the hole, it appears that his increase in symptoms were temporary. It is uncontroverted that Dr. Gorecki had advised claimant on the need for surgery, he had discussed the different methodologies and had scheduled claimant for a discogram, a diagnostic test that is a painful but useful tool. Neither of the physicians offered any opinions that relate solely to the permanent impairment solely for the January 24, 2005 accident. Dr. Fluter simply assigned a 26 percent for the work injuries[28] and attempted to account for the effects of the September 2003 accident. Dr. Stein testified that claimant had too many other things going on that could account for his back complaints to believe that the January 24, 2005 accident could have caused any permanent impairment. He specifically testified that there was no objective evidence that the January 24, 2005 accident caused additional injury or structural change.[29]

Accordingly, the majority of the Board finds that claimant sustained only a temporary aggravation of his low back condition as a result of the January 24, 2005 accident. And

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[26] R.H. Trans. at 4.

[27] Claimant's Submission Letter at 10-12 (filed Feb. 12, 2008).

[28] Fluter Depo. at 14.

[29] Stein Depo. at 39.

because his aggravation was only temporary, he is not entitled to any permanent impairment as a result of that injury. He is, however, entitled to the TTD benefits that were paid, at the rate of $364.26 per week, for a period of 110.12 weeks and the medical treatment associated with that injury.[30]

In light of the majority's conclusion that claimant did not sustain any permanent impairment as a result of his January 24, 2005 accident, there is no need to consider the claimant's allegation that he is entitled to a permanent partial general work for functional disability compensation under K.S.A. 44-510e(a) and to the extent the Award granted permanent partial disability benefits, that portion of the Award is reversed.

The balance of the Award is affirmed to the extent it is not modified above.

The record does contain a fee agreement between claimant and his attorney. The Board notes that the ALJ did not award claimant's counsel a fee for his services. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated April 15, 2008, is reversed and modified as follows:

Docket No. 1,021,513

The claimant is not entitled to an award.

Docket No. 1,021,390

The claimant is entitled to an award against respondent for 110.12 weeks of temporary total disability paid at a rate of $364.26 for a total of $40,112,47, less sums already paid and all authorized and unauthorized medical to the statutory maximum. No work disability or permanent partial disability is awarded.

[30] The final paragraphs of the Award reflected a TTD payment rate of $389.21, but the parties agreed the correct rate for payment was $364.26

IT IS SO ORDERED.

Dated this _____ day of August 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned individual board members concur in the majority's findings with respect to claimant's failure to timely assert his September 2003 claim as required by K.S.A. 44-520a. However, we dissent on that portion of the majority's opinion that finds that claimant established only a temporary aggravation of preexisting condition as a result of his January 24, 2005 accident. Claimant's subsequent injury on January 24, 2005, gave rise to an acute increase in his symptoms. Those symptoms caused him to return to see Dr. Bliss and obtain another referral to Dr. Gorecki and stop working due to his complaints. We would find that the January 24, 2005 accident accelerated claimant's need for surgery and is therefore he is entitled to receive benefits for his additional permanent injuries.

_____
BOARD MEMBER

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BOARD MEMBER

c: J. Shawn Elliott, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge